

calling upon the respondent to show cause why certain charged lands of his shall not be sold by public auction in satisfaction of a debt due to the applicant. It was opposed in chambers and adjourned into open Court for argument.

At the hearing Mr. Chan, for the respondent, had two preliminary objections. As he is, in my opinion, entitled to succeed on one of them I need only refer briefly to the other. That was that "proceedings" should have been taken by way of a civil suit and not by Originating Summons. The basis of Mr. Chan's submission was that section 21(1) of the Moneylenders Ordinance, 1951, provides that "where proceedings are taken in any Court" by a moneylender for the recovery of any money lent" etc. and the meaning of the word "proceedings" is made clear by the marginal note which reads "Account . . . to be produced when suing in Court." In reply Mr. Huntsman, for the applicant, submitted that the words of the Ordinance must be construed strictly (*Guthrie v. Fisk*⁽¹⁾ and *In re Nance*⁽²⁾). The word "proceedings" embraces all forms of action instituted in Courts and its meaning cannot be circumscribed by the marginal note which, in any case, is not part of the Ordinance.

On this submission I favour the view put forward by Mr. Huntsman and overrule the objection on that ground.

Mr. Chan's second objection was that section 21(1) of the Ordinance provides that "where any proceedings are taken in any Court by a moneylender . . . he shall produce a statement of his account . . ." This, Mr. Chan submitted, means "shall produce at the time the Originating Summons" (in this application) "was filed". In this case respondent had not been supplied with a copy of the account up to the time when the application was first argued. In Mr. Chan's submission this non-compliance with a statutory requirement is an irregularity which the Court cannot waive. (*Arjan Singh v. Hashim Angullia & ors.*⁽³⁾). Mr. Huntsman had no answer to this but asked for an adjournment and immediately filed a copy of the account. In my opinion, for the reasons stated by Terrell J.A., in *Arjan Singh's* case, this has not cured the irregularity as respondent had filed his counter-affidavit before seeing the account. Thus I feel bound to follow the ruling in *Arjan Singh's* case and consequently dismiss the application with costs to respondent.

Application dismissed.

Solicitors: Maxwell, Kenion, Cowdy & Jones; K. C. Chan.

DOWSE v. DOWSE

[O. C. J. (Rigby J.) November 6, 1958]

[Penang — Divorce Petition No. 3 of 1956]

Divorce — Discretion — Constructive desertion — What is — Husband's petition — Presumption of continuing desertion — Deserted spouse's confession of adultery — Maintenance of wife even though guilty party.

This was a husband's petition for divorce on the ground of desertion. The respondent denied that she was guilty of desertion and in defence alleged constructive desertion on the part of the petitioner. She prayed for a decree to be granted in her favour and accordingly lodged a Discretion Statement which revealed adultery on her part. The issue before the Court was whether she had sufficient justification in law to entitle her to leave the matrimonial home.

Held: (1) on the evidence established, constructive desertion on the part of the petitioner was not proved within the meaning of *Lang v. Lang*⁽¹⁾; a deserted spouse is under no obligation to show he wanted the return of the other spouse. Hence the respondent was not justified to leave the matrimonial home and a decree nisi was granted.

(2) the power of the Court to award maintenance extends not only to an innocent but also to a guilty party and depends upon the circumstances in each case.

[Editorial Note: A decree nisi granted to the petitioner on February 8, 1956, was rescinded by Rigby J. on July 6, 1957, on the grounds of collusion, the Attorney-General showing cause ([1957] M.L.J. 12). On November 6, 1958, the petitioner again obtained a decree nisi which was again rescinded by Rigby J. on January 22, 1960, on the intervention of the Attorney-General, on the ground of the petitioner's own undisclosed adultery. On the evidence established, Rigby J. held that ". . . It should be clearly understood that where a petitioner seeks for divorce and has himself been guilty of the matrimonial offence of adultery, it is his duty fully to disclose that fact to the Court in what is known as a "discretion statement" and ask for the discretion of the Court to be exercised in his favour . . ." On the facts found the petitioner had wilfully and deliberately suppressed the facts of his own adultery and the decree nisi was accordingly rescinded.]

Cases referred to:—

- (1) *Lang v. Lang*, [1955] A.C., 402; [1954] 3 W.L.R. 762; [1954] 3 All E.R. 571, P.C.
- (2) *Sifton v. Sifton*, [1939] P. 221; [1939] 1 All E.R., 109.
- (3) *Church v. Church*, [1952] P. 313; [1952] 2 All E.R. 441.
- (4) *Clueit v. Clueit*, [1958] 1 W.L.R. 463; [1958] 1 All E.R. 417.
- (5) *Clear v. Clear*, [1958] 1 W.L.R. 467; [1958] 2 All E.R. 353.
- (6) *Sydenham v. Sydenham & Illingworth*, [1949] 2 All E.R. 196; 65 T.L.R. 489.

DIVORCE PETITION.

R. H. Green for the petitioner.

Lim Ewe Hock for the respondent.

Rigby J.: This case has taken a great deal of time and a considerable volume of evidence has been heard, but having regard to the view that I have clearly formed on the evidence I consider that no useful purpose can be served by my reserving judgment.

This is a husband's petition for divorce on the ground of desertion without reasonable cause for the necessary statutory period of at least three years immediately preceding the presentation of the petition. The Petition was presented on the 20th August, 1956. The respondent, by her answer, denied that she was guilty of desertion. She further prayed for a decree to be granted in her favour on the ground that the petitioner had himself been guilty of physical cruelty and/or by his conduct and treatment of her he had compelled her to leave the matrimonial home and so he himself had been guilty of desertion.

There was a further prayer at the conclusion of her answer to the petition, in which she asked for a decree in her favour on the ground that the petitioner since the date of the alleged desertion, on the 5th October, 1952, had himself habitually committed adultery with a woman or women unknown. It is right that I should say at once that that allegation was struck out from her answer at an early stage in these proceedings, and before the trial before me, on the total inability of the respondent to give further and better particulars of any of those acts of adultery or as to the name of any woman or women concerned. Her answer before this Court proceeded, therefore, solely on her allegations of cruelty and/or constructive desertion.

The parties were married in Singapore on the 1st March, 1947. At the time of the marriage the petitioner was a bachelor, aged 29, and the respondent a widow, aged 43. The petitioner was then a Cadet in the Malayan Civil Service. After the marriage the parties lived together at various addresses in Malaya, at which the husband was stationed, and also proceeded on leave to England in 1950. The petitioner's case is that although the respondent was reasonably happy and contented in Malaya throughout the greater part of their married life in this country she hankered, and was continually hankering, to return to London; that on three previous occasions between March and June, 1952, she booked her passage to return to England and that he dissuaded her from so going; but that finally in August, 1952, she again booked her passage and that, despite his endeavours to persuade her to the contrary, she packed up and sailed on the 5th October, 1952. That she did, in fact, sail on that date — and against the petitioner's wishes — is indisputable.

The sole issue for consideration — as I understand it — is as to whether she had sufficient justification in law to entitle her to leave the matrimonial home. The respondent seeks to justify her action by saying that the physical cruelty of her husband and his general conduct towards her was such as to compel her to leave him, so that he was himself guilty of what is known as constructive desertion. What is meant by constructive desertion is very clearly set out in the headnote to the case of *Lang v. Lang*⁽¹⁾, and I propose to read it. It states:—

"Where a husband's conduct towards his wife was such that a reasonable man would know — that the husband must have known — that in all probability it would result in the departure of the wife from the matrimonial home, that, in the absence of rebutting evidence, was sufficient proof of an intention on his part to disrupt the home, and the fact that he nevertheless desired or requested her to stay did not rebut the intention to be inferred from his acts — that he intended to drive her out — and he was guilty of constructive desertion."

Now I have considerable sympathy for the respondent in this case. It is clear that to all intents and purposes she had severed her connection with this country while, on the other hand, her husband continues to live here. She was faced with the difficulty of trying to get

A evidence in respect of matters which happened — or a course of conduct which she alleges was going on — from 1947 to 1950. Witnesses who might have been in a position to help her have left the country. It is perfectly true, of course, as Mr. Green has said, that with the exercise of due diligence they might have been traced. B It is also true that there may be witnesses in this country who, if they had wished to help the respondent in her predicament, might well have come forward and been of assistance to her. But it is a triate observation to say that Courts must act upon evidence given and established before them and not upon idle speculation and conjecture totally unsupported by any established evidence whatsoever. C

Apart from the specific allegations of cruelty, to which I shall in a moment briefly refer, the respondent's main complaints against the petitioner appear to be that he was of an extremely jealous nature; that he was constantly accusing her of a desire on her part to be unfaithful to him; that he used abusive language towards her; and that he was thoroughly improvident and a reckless spendthrift. Quite apart from the considerable disparity in their ages, it is abundantly clear that both were wholly unsuited towards each other. Having heard and seen both of them in the witness-box I would hesitate to rely upon the evidence of either of them without independent corroboration as to the accuracy of their testimony. Making allowances for unsuitability of temperament and for the frequent quarrels that undoubtedly arose between them — indeed, what has been described as the wear and tear of married life — I have come to the conclusion that it would be quite impossible for me to say that there is sufficient evidence in this case before me which would justify me in saying that the petitioner had been guilty of constructive desertion within the meaning of those words that I have quoted from the headnote of the judgment in *Lang v. Lang*; or, indeed, that the petitioner's conduct had been such as to justify the respondent in leaving the matrimonial home. D E F G

As to the specific allegations of cruelty. Charges of this nature are easy to allege but often difficult to defend — particularly in respect of acts which allegedly took place several years ago. It is virtually one person's word against the other. The evidence taken in England upon commission, of the witness Edwina Dunne does not, in my view, materially assist the respondent. On the view that I have formed as to the credibility of both parties I would certainly not be prepared to accept the allegations of the respondent as to the assaults without some independent evidence of a corroborative nature. H

In two specific instances the respondent sought to supply that corroboration. In the first instance she alleged that she had been assaulted during the day in, I think, the dining room whilst the parties were living at their house in Scotland Road. She said that the assault, in fact, took place in the presence of their servant, Minah. Minah was called as a witness by the petitioner and, in fact, denied that any such incident had occurred. I

The other instance was in respect of what Mr. Green has described as the "highlight" in the respondent's case on the charge of cruelty, namely, an assault which, it is alleged, was committed by the petitioner upon the respondent at about midnight in their car whilst in Gottlieb Road. Prior to the actual incident the respondent had been at the house of one, Mrs. Yeo. The respondent gave certain evidence—and I think it is unnecessary to refer to it—as to what transpired in the house whilst she was there, and on the arrival of her husband whilst she was still there. It is, I think, sufficient to say that on this aspect of the matter she was in no way corroborated by the evidence of Mrs. Yeo as to the incident that occurred at Mrs. Yeo's house on that occasion. Indeed, Mrs. Yeo gave evidence as to the show of temper displayed by the respondent in her house and as to the exercise of considerable restraint by the petitioner himself on that occasion. Whilst it is perfectly true that Mrs. Yeo's evidence does not assist as to the act of the alleged assault itself it does, at any event, controvert the truth of the respondent's allegation as to what transpired immediately before the assault.

I am satisfied on the evidence that the respondent left the petitioner without reasonable cause on the 5th October, 1952.

Certain correspondence between the parties subsequent to that date has been put in evidence before me. On that correspondence it seems abundantly clear—and I am so satisfied—that the petitioner genuinely missed his wife after she had then left—departing against his wishes. However, as the passage of time went on it is equally apparent that he missed her less and less, until, indeed, he no longer wanted her back, and wanted a divorce. What, therefore, is the position in law of a spouse who has been deserted in those circumstances, but who is content that his wife should have left him and makes no attempt to get her to return to the matrimonial home? I think the position is clearly stated in the case of *Sifton v. Sifton*⁽²⁾. Again, I quote from the headnote, which states:—

"When a spouse is deserted, he or she is in the position that the presumption is in his or her favour and against the deserting spouse. It is not until some offer to return is made by the deserting spouse that the question arises whether it is an offer which ought, in all the circumstances, to be accepted. Notwithstanding that the husband did not expect or really want his wife to come back, it was not incumbent on him to show that he was at all times during the three years next preceding the petition ready and willing to receive her."

I am quite satisfied in this case that no offer—and certainly no *bona fide* offer—was ever made by the respondent, after she had left on the 5th October, 1952, to return to her husband. The decision in *Sifton v. Sifton* was quoted with approval in the later case of *Church v. Church*⁽³⁾. Again, I read from the headnote, which states:—

"Once desertion has been started by the fault of a deserting spouse it is no longer necessary for the deserted spouse to show that during the material period he actually wanted the other spouse to come back".

In my view, for the reasons I have given there must accordingly be a decree nisi in favour

A of the petitioner on the ground of desertion as prayed for by him in his petition.

One further matter. The respondent, by her answer, asked for the discretion of the Court to be exercised in her favour, and then, of course, in accordance with the practice of this Court, a Discretion Statement was lodged by her. B Mr. Green, at the conclusion of the respondent's evidence and in accordance with a recent decision in the case of *Clueit v. Clueit*⁽⁴⁾ and approved by the Court of Appeal in the case of *Clear v. Clear*⁽⁵⁾, inquired whether it was the intention of the respondent to put in evidence the Discretion Statement, and Mr. Lim Ewe Hock, as, indeed, he was virtually bound to do so, replied in the affirmative. C As a result of that Discretion Statement being put in evidence the petitioner asked for leave to amend his Petition by including a prayer for a decree nisi on the ground of the respondent's adultery. A copy of the petition, as amended, was sought to be served upon the co-respondent, but upon affidavits put before me D I was entirely satisfied that he could not be found, and accordingly I dispensed with the necessity of serving a copy of the Petition upon him. Nevertheless, on the face of that Discretion Statement it is apparent that the respondent was herself guilty of adultery, and on that ground alone I should be justified in granting—and, indeed, I would grant—a decree nisi for divorce E on this petition. I think, however, that it is only fair that I should say that I am fully satisfied that that act or those acts of adultery committed by the respondent were, in fact, so committed when it was clear beyond doubt that the marriage between the parties was irretrievably broken and F at an end.

One last matter to which I would refer, although it is not strictly relevant at this stage of these proceedings, and that is the question of maintenance arising as a result of this decree nisi. Again, I would refer to the case of *Clear v. Clear* and to a passage in the judgment of Lord Justice Hodson in that case, in which he quoted a passage G from the judgment of Lord Justice Denning, as he then was, in the case of *Sydenham v. Sydenham & Illingworth*⁽⁶⁾, in which Lord Denning said:—

"There is nothing in the statute to say that a wife against whom a decree has been made cannot be awarded maintenance, and there is nothing in it about discretion being exercised 'in favour of' one side or the other or about a 'compassionate allowance' . . ."

H Lord Justice Hodson then went on to say:—

"All it (i.e. the statute) says is that on a decree of divorce the court may award maintenance to the wife. This includes a guilty wife as well as an innocent one, but in awarding maintenance the court must have regard, of course, to the conduct of the parties."

I That is a matter which no doubt will be brought before me at a later stage.

For these reasons there must be a decree nisi on the petition; such decree nisi to be made absolute within three months. The answer, or cross-petition, brought by the respondent must be dismissed.

Decree nisi granted.

Solicitors: *Braddell Bros.; Hogan, Adams & Allan.*